

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2015-290-C

IN RE:)
)
Petition of the South Carolina Telephone)
Coalition for a Determination that Wireless)
Carriers are Providing Radio-Based Local)
Exchange Services in South Carolina that)
Compete with Local Telecommunications)
Services Provided in the State)
_____)

**MOTION TO DISMISS PETITION, OR,
IN THE ALTERNATIVE, EXPAND
SCOPE OF PROCEEDING, AND TO
SUSPEND CASE SCHEDULE**

CTIA – The Wireless Association ® (“CTIA”) respectfully moves the Public Service Commission of South Carolina (“Commission”) to enter an order dismissing the August 11, 2015 Petition for a Determination that Wireless Carriers are Providing Radio-Based Local Exchange Services in South Carolina that Compete with Local Telecommunications Services Provided in the State (“Petition”) of the South Carolina Telephone Coalition and its individual member companies (“SCTC”). Alternatively, CTIA moves the Commission to expand the scope of this proceeding so the Commission can evaluate appropriate reductions in the size of the South Carolina Universal Service Fund (“USF” or “the fund”). Finally, CTIA requests that the Commission suspend the case schedule pending resolution of this motion.

I. INTRODUCTION

The Petition asks the Commission to enter a finding, pursuant to S.C. Code Ann. § 58-9-280(E)(3), that wireless carriers offering retail services provide telecommunications services, and

that they provide “radio-based local exchange services”¹ that compete with local telecommunications service. Not stated in the Petition is the practical effect of the SCTC’s request, which is to require over 4.4 million wireless subscribers – through charges on wireless carrier bills – to pay into the USF and perpetuate inflated subsidies made to certain incumbent local exchange carriers (“ILECs”), including SCTC members. If the Petition is granted, wireless consumers will immediately become the primary payers of USF subsidies because there are more than twice as many wireless consumers in South Carolina as there are access lines.²

Under S.C. Code Ann. §58-9-280(E)(3), the Commission is not required to move forward with this Docket, but rather, has the authority to determine whether and how to proceed. The Commission should decline to proceed with this case, and should dismiss the Petition, because the Petition fails to plead facts sufficient to support its claim.

However, if the Commission does not dismiss this case, it should not consider the SCTC’s request without first conducting a comprehensive evaluation of the USF subsidy program. The fund was created more than a decade ago, and its funding level is linked to 1980s “monopoly-era” figures which are woefully out-of-date. Any continued state funding for universal service needs to take into account the present, dynamic communications environment. A comprehensive evaluation of the USF subsidy program would permit the Commission to ensure the program is narrowly tailored to its original purpose – access to telephone service for all South Carolinians. That objective, long since achieved, is best sustained through the dynamic

¹ S.C. Code Ann. § 58-9-280(E)(3).

² The FCC’s *Local Competition: Status as of December 31, 2013* report indicates at Table 9 that there were 1,798,000 access lines in the state at the end of 2013, and at Table 18 that there were 4,447,000 wireless subscribers in the state at the end of 2013. Available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-329975A1.pdf (last accessed September 22, 2015).

competition in South Carolina's telecommunications industry, not through a decades-old system of government subsidies.

The SCTC, representing USF recipients, asks the Commission to “double down” on the current USF program by extending the USF charge to millions more consumers in order to maintain the SCTC members' subsidies, even as consumers increasingly reject wireline services. Rather than maintaining an obsolete USF subsidy system that makes little sense in today's communications environment, the Commission – if it does not reject the SCTC's Petition outright – should broaden this proceeding to consider market-based reforms to the USF, with the goal of reducing the size of the annual subsidy. By trimming the fund, the Commission would relieve consumers of a significant monopoly-era tax burden, and ensure that over 4.4 million South Carolina wireless subscribers are not accountable for a fee which subsidizes the operations of wireline carriers.

Additionally, the Commission should suspend the case schedule to give parties adequate time to address the present motion, which, if granted, either will dispose of the case entirely or change its scope substantially. The current case schedule calls for a hearing on the Petition in less than two months. By putting a hold on the schedule, the Commission can ensure the issues raised herein are addressed in a complete and thorough manner. If the Commission ultimately decides to move forward, it should adopt a schedule that gives the parties sufficient time to develop the record that is necessary for a case of this magnitude.

II. THE COMMISSION SHOULD DISMISS SCTC’S PETITION, WHICH DOES NOT PLEAD FACTS SUFFICIENT TO SUPPORT THE RELIEF REQUESTED AND FAILS TO PROVIDE ADEQUATE NOTICE

The SCTC’s Petition seeks relief under S.C. Code Ann. § 58-9-280(E)(3), which authorizes the Commission to require providers of “private local exchange services” or “radio-based local exchange services” to contribute to the USF “after notice and opportunity for hearing.” The statute leaves to the Commission’s discretion whether and when to issue such notice and hold such a hearing. The Commission is not required to proceed merely because the SCTC has requested it to do so. In fact, the Commission should not move forward with this case, and should dismiss the Petition, because the Petition provides no explanation why the Commission should exercise its discretion to proceed now, fails to plead facts upon which relief can be granted, and fails to provide adequate notice.³

The Petition provides no support for its request that the Commission hold a hearing and declare that wireless carriers provide radio-based local exchange services that compete with local telecommunications services in South Carolina, which would make wireless carriers responsible for USF contributions. Pursuant to Section 58-9-280(G), “[c]ompetition exists for a particular service if, for an identifiable class or group of customers in an exchange, group of exchanges, or other clearly defined geographical area, the service, its functional equivalent, or a substitute service is available from two or more providers.” Distilling the foregoing, the required showing must define:

- (1) a particular service,
- (2) a class or group of customers of the service,
- (3) a clearly defined geographic area in which those customers consume the defined service, and

³ Cf. Rule 12(b)(6), SCRCF; *compare, also*, Commission Order No. 2003-656, Docket Nos. 2002-367-C and 2002-408-C, 2003 WL 23303602 (2003) (finding facts sufficient to avoid dismissal under Rule 12(b)(6)).

- (4) the presence of two or more providers making available the service, a functional equivalent to the service or a substitute service to the defined customer class in the defined geographic area.

The Commission has had occasion to apply the statutory test set out in S.C. Code Ann. § 58-9-280(G)(1). Under the precedent set by the Commission in Docket No. 97-23-C, which culminated in Commission Order No. 2001-419 (“USF Order”), the SCTC must meet a substantial evidentiary burden to establish the existence of competition sufficient to sustain its request.⁴ In that docket, the Commission considered whether wireless carriers should be required to contribute to the USF and concluded, based on the lack of evidence presented, that wireless carriers would *not* be required to contribute unless they elected to apply for carrier of last resort or eligible telecommunications carrier status.⁵

Testifying in Docket No. 97-23-C, then Commission Executive Director Gary Walsh indicated: “The SCTA⁶ has provided no evidence that any wireless communications service provider competes with any local exchange service provided in South Carolina. Therefore, I do not believe that wireless carriers in South Carolina should be required to contribute to the State USF...”⁷ The Commission agreed with Mr. Walsh that “there has not been sufficient evidence presented in the proceeding that any wireless communications service provider competes with any local exchange provider in South Carolina” and determined that wireless communications providers should therefore not be required to contribute to the USF.⁸

⁴ See Prefiled Direct Testimony of Gary E. Walsh, p.9, 1.23 – p.10, 1.5; Tr. Vol. IV, p. 1128, Docket No. 97-239-C (July 17, 2000)(“Walsh Testimony”)(“[U]nder §58-9-280(G), the legislature has provided specific criteria that must be met to determine whether or not a wireless service competes with a local exchange service.”); *also at* USF Order at 21.

⁵ USF Order at 36.

⁶ The South Carolina Telecommunications Association (“SCTA”) was comprised of ILECs, many of whom are members of the SCTC.

⁷ Walsh Testimony, p. 10.

⁸ USF Order at 36. The Commission further noted that the effect of this ruling was to grant the motion for directed verdict made by Verizon Wireless on this point. *Id.* at 36-37. The Commission noted that “while the record before us

The foregoing illustrates that the Commission will deny relief under S.C. Code Ann. § 58-9-280(G)(1) where insufficient evidence is presented. In the instant matter, the SCTC has failed to plead even the basic elements necessary to allege its claim under S.C. Code Ann. § 58-9-280(G)(1). Namely, it does not allege the presence, let alone the identity, of two or more providers; it does not define the relevant geographic area in which those unidentified providers allegedly operate; and it does not define the customer class the unidentified providers compete to serve. In short, the Petition fails to plead facts sufficient to satisfy even a single element of the test for relief under Section 58-9-280(G)(1). For this reason, the Petition must be dismissed.

In addition, the Petition is also fatally deficient because by failing to satisfy the statutory criteria delineated under Section 58-9-280(G)(1), the Petition also causes a violation of Section 58-9-280(E)(3). The later section prohibits the Commission from requiring any company to contribute to the USF unless the Commission finds “*after notice and opportunity for hearing*” (emphasis added) that the company is “providing ... radio-based local exchange services in this State that compete with a local telecommunications service provided in this State.” The SCTC fails to identify in its Petition the relevant geographic area, the relevant customer group and the alleged competitors. Without those details, no company can be deemed to be on notice as required by Section 58-9-280(E)(3). The law requires more than a sweeping allegation that “retail wireless carriers are providing radio-based local exchange services that compete with local telecommunications service in South Carolina.”⁹ Not only does the Petition create a notice deficiency by failing to plead with specificity the information required to satisfy Section 58-9-280(G)(1), it also fails to allege any basis on which the Commission could conclude that wireless carriers provide “radio-based local exchange service” – a term defined neither by statute nor by

is not sufficient to make a finding otherwise, we reserve the right to revisit the issue.” *Id.* at 37.

⁹ Petition at 3.

the Commission. The Pleading also fails to state what showing must be made to prove that a radio-based local exchange service provider competes with local telecommunications service, or whether such providers actually compete with any SCTC members.

For all the foregoing reasons, the Petition should be dismissed for failing to plead facts upon which relief can be granted.¹⁰ Alternatively, as the Commission is vested with discretion to determine whether and when to initiate a review of the fund, it should exercise its discretion by dismissing the instant docket *sua sponte*. If the Commission determines to proceed, however, it should expand the scope of this docket so it can fundamentally reexamine the fund to ensure that it is narrowly tailored to achieve its purpose and appropriately sized so as not to tax South Carolina consumers unnecessarily.

III. IF THE PETITION IS NOT DISMISSED, THE COMMISSION SHOULD EXPAND THE SCOPE OF THIS PROCEEDING TO CONSIDER REDUCING THE SIZE OF THE FUND

While CTIA believes that the Petition should be dismissed for the reasons presented above, if the Commission moves forward with this case, it should exercise its discretion to reduce the size of the fund before considering whether new USF fees will be imposed on millions of additional consumers. A more comprehensive review of South Carolina's USF program is warranted because the fund is sized based on obsolete data; current funding levels are not needed to sustain universal service; and the fund's lack of transparency and accountability are inappropriate given the economic burden it places on consumers.

¹⁰ The Commission may also note that the relief sought is invalid because it constitutes an adjustment of charges that only can be made through an application. *See* 10 S.C. Code Regs. 103-823 ("Applications are submitted to the Commission for any authorization or permission which the Commission is empowered to grant under its statutory authority, including applications for establishment or adjustment of rates and charges."). *See also* 10 S.C. Code Regs. 103-825 ("[p]etitions may be submitted to the Commission for any relief, other than an adjustment of rates and charges").

A. USF Funding Should Not Be Tied to Divestiture-Era Subsidies

In 1996, the Legislature authorized the Commission to establish the USF to continue “South Carolina’s commitment to universally available basic local exchange telephone service at affordable rates and to assist with the alignment of prices and/or cost recovery with costs.”¹¹ When the Commission established the USF in 2001, it exercised discretion in sizing the fund, deciding that initially the USF would offset savings generated by reducing state access charges by 50%. Although some changes to the fund have been made over the years, its basic structure today is still based on the Commission’s 2001 ruling, which was premised on the access charge subsidy system that was the result of the break-up of the Bell System in the 1980s. Back then, wireless phones were new, the public Internet was still on the drawing board, and caller ID was considered a major innovation. Over time, market forces (and rate reductions) have eroded switched access revenues (and access lines), but the fund serves to protect those revenues and financially immunize ILECs from the ongoing transformations in technology and consumer preferences that drive today’s modern communications ecosystem and economy.

The SCTC member companies seek to maintain the current USF system, and the obsolete subsidy system it perpetuates, by imposing the USF fee on an additional 4.4 million South Carolina subscribers. Preserving rotary-phone-era subsidies in a smartphone world is counterproductive, and the Commission should fix this outmoded system rather than taxing more South Carolina consumers to fund it. Accordingly, if the Commission does not dismiss the SCTC’s Petition, the Commission should instead conduct a comprehensive review of the fund with an eye toward reducing its size.

¹¹ S.C. Code Ann. § 58-9-280(E).

B. Current USF Funding Levels Are Not Needed to Sustain Universal Service

The principal objective of the USF is to ensure access to universally available basic local exchange telephone service at affordable rates. To measure whether that goal has been achieved in today's market, the Commission should look to penetration levels for *all* voice services that South Carolinians are buying. A narrow focus on traditional landline service might give the false impression that the availability of local service is declining. That is not the case. Voice penetration levels may be determined by dividing the number of South Carolina households that purchase voice communications service by the state's total number of households. The Federal Communication Commission ("FCC") regularly compiles this information, which is publicly available. According to FCC Universal Service Monitoring Reports, South Carolina's voice service penetration rates in the years 2010-2013 were as follows¹²:

2010	97.1%
2011	97.2%
2012	97.3%
2013	97.7%

There is no reason to believe that the current trend will change anytime soon. The fact that year after year, more than 97% of all South Carolinian households purchase voice communications services demonstrates that the goal of universal service has been achieved.

However, as shown in the following chart, neighboring states have achieved similar penetration rates without a similarly sized state high-cost fund, and in some cases, with no fund at all:

¹² See *Universal Service Monitoring Report: 2014* at Table 6.6 (available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-330829A1.pdf (last accessed September 22, 2015)).

2013 Fund Sizes and Voice Penetration Rates in South Carolina and Neighboring States

State	Fund Size	Penetration Rate
SC	\$28M	97.7%
GA	\$15M	97.6%
NC	No state fund	97.8%
TN	No state fund	97.6%

North Carolina and Tennessee have achieved penetration levels similar to South Carolina's without state universal service funds.¹³ Despite not having universal service funds, consumers in those two states have access to and purchase voice communications services just as South Carolinians do. While the state of Georgia maintains a universal service fund, its fund is significantly smaller than South Carolina's, wireless consumers are not required to contribute, and penetration rates in Georgia are roughly the same as in South Carolina.

Further, there is no data available from the Commission or submitted by the SCTC suggesting that state USF funding is necessary to meet the goal of universal service. This is in part due to a lack of data regarding how state USF money is actually spent. If the SCTC is successful in its quest to maintain or expand the USF subsidies its member companies collect, South Carolina individuals and families will end up paying traditional phone companies a staggering quarter-billion dollars over the next decade. However, the current USF program does not provide sufficient transparency and accountability to protect those taxpayers and ensure their funds are being spent only for their intended purpose.

Federal agencies have noted that a lack of transparency in USF funding can be harmful to carriers and consumers. While reviewing the Federal Communications Commission's ("FCC's") universal service programs, the Government Accountability Office stated that "it is important [...] that funding recipients be held accountable for their use of billions of dollars of the public's

¹³ There are non-high-cost state funds in North Carolina, but the comparison here is high-cost to high-cost.

money” (a point with which the FCC agrees) and not “assume that the program’s subsidies going to carriers are positively affecting subscribership without collecting data to support that assumption.”¹⁴ Without appropriate controls to ensure transparency and accountability for universal service funding, it is unclear how much of taxpayers’ USF surcharge is being used to achieve the program’s express goal of universal service, or if those funds are being used for other business purposes. Any review of the USF program must ensure that carriers are held responsible for the subsidies they are granted.

In short, there is little or no reason to believe that South Carolina’s consumers must continue to pay the current USF fee in order to preserve universal service. Before taking up the SCTC’s unsubstantiated request to impose the fee on wireless consumers, the Commission should first evaluate whether the fund, as currently sized, is actually necessary to achieve universal service in South Carolina.

IV. THE COMMISSION SHOULD SUSPEND THE PROCEDURAL SCHEDULE TO ALLOW APPROPRIATE TIME TO CONSIDER THE PRESENT MOTION

The current procedural schedule in the instant case calls for several rounds of pre-filed testimony over the next month followed by a hearing on November 3, 2015. CTIA respectfully requests that this schedule be suspended pending resolution of this motion. Suspension will ensure that the Commission and parties will not have wasted time and resources addressing the SCTC’s petition if the Commission grants either of CTIA’s alternative requests. If the Commission grants dismissal, any resources expended on the case, other than addressing the motion itself, will have been to no avail. And if the Commission grants the alternative request to

¹⁴ United States Government Accountability Office, “FCC Should Improve the Accountability and Transparency of High Cost Program Funding” (July 2014), at 29-30, available at <http://gao.gov/assets/670/664939.pdf> (last accessed September 23, 2015).

expand the proceedings, a much different schedule will be required. Even if CTIA's motion is denied, a revised schedule will be necessary to ensure that the parties can develop the record that is needed for a case of this magnitude. Accordingly, the current schedule should be suspended until the Commission rules on this motion.

V. CONCLUSION

For the foregoing reasons, CTIA requests that the Petition be dismissed, or, in the alternative, that the scope of this case be expanded to include a comprehensive review of the USF. CTIA also requests that the case schedule be suspended pending resolution of this motion.

Respectfully submitted,

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BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2015-290-C

IN RE:

Petition of the South Carolina)	
Telephone Coalition for a Determination)	
that Wireless Carriers are Providing)	CERTIFICATE OF SERVICE
Radio-Based Local Exchange Services)	
in South Carolina that Compete with)	
Local Telecommunications Services)	
Provided in the State)	

This is to certify that I have caused to be served this day, the Motion to Dismiss Petition, Or, In the Alternative, Expand Scope of Proceeding and to Suspend Case Schedule, filed by CTIA-The Wireless Association®, as follows:

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